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IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT VIAD CORP

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN & GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*Admitted in Massachusetts only

Attorneys for Respondent Viad Corp

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SUPPLEMENTAL BRIEF FOR RESPONDENT VIAD CORP

The petition in this case is one of three similar petitions pending before this Court, all of which present the question whether the Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*—now called the Locomotive Inspection Act (LIA)—preempts state regulation of the design of locomotives and their parts and appurtenances, as this Court held in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926). *See also John Crane, Inc. v. Atwell*, No. 10-272 (filed Aug. 23, 2010); *Griffin Wheel Co. v. Harris*, No. 10-520 (filed Oct. 12, 2010). On November 1, 2010, this Court invited the Acting Solicitor General to file a brief expressing the views of the United States in *Atwell*. *See* 131 S. Ct. 552. That brief was filed on May 6, 2011. Respondent Viad Corp submits this supplemental brief in response.

As explained below, the government's brief urging review in *Atwell* actually makes a persuasive case for *denying* review in that case, both as a vehicle for resolving the question presented generally, and for considering the various novel preemption theories articulated in the government's brief. If this Court is inclined to examine the scope of LIA preemption, it should do so in the instant case, which presents a more appropriate factual vehicle for evaluating the competing theories now before the Court.

ARGUMENT

The LIA delegates to the Department of Transportation (DOT) authority to regulate "the locomotive or tender and its parts and appurtenances." 49

U.S.C. § 20701. In *Napier*, this Court held that because of the "broad scope of the authority conferred upon the [DOT]," the LIA "was intended to occupy the field" of regulation delegated to DOT, which the Court defined as "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. at 611, 613.

The government correctly argues that no post-*Napier* acts of Congress or precedents of this Court altered the scope of LIA field preemption identified in *Napier*. U.S. Br. 19-22. The government also argues, however, that the LIA only governs the design and construction of locomotives that are *in use*, and that the statute's field preemptive scope thus extends only to claims arising from injuries sustained while the locomotive is actively being used, and not when it is being repaired off-line. That proposition is contrary to *Napier*, the LIA, and the settled law of every jurisdiction to have considered the question, save Pennsylvania. It is also contrary to common sense: the design and construction of a locomotive are the same whether it is on the track or in the repair house.

The government recognizes that common-sense problem and answers it by proposing a *new* LIA preemption rule to supplement the narrow "in use" field preemption the government describes. The government says claims concerning the design, construction, or material of a locomotive in the repair house are not field preempted under *Napier* but are *conflict* preempted, because such claims frustrate the purpose of the LIA. The distinction has never been adopted by any court, and it makes no sense: design-defect-type claims would conflict with the LIA's

purpose only because that purpose was to make regulation of locomotive design an exclusively federal matter, which is precisely the reason *Napier* held that all such claims are *field* preempted.

Finally, the government proposes yet another new wrinkle on LIA preemption. It contends that failure-to-warn claims (unlike design defect claims) are neither field nor conflict preempted, because such claims would not literally require manufacturers to alter the design or construction of the locomotive. That distinction, too, is untenable. Every claim seeking to establish liability for a given locomotive design choice can be recast as a claim to establish liability for failing to give a proper warning about that design choice. The point of the LIA is to prohibit states from establishing and enforcing their own legal standards concerning locomotive design, which is exactly what a state does when it decides that a particular design is unlawful unless accompanied by the state's own chosen warning.

A. LIA Field Preemption Extends To All State Regulation Of Locomotive Design And Construction

The government agrees with Viad that the LIA preempts the regulatory field of locomotive design and construction, but asserts that the field extends only to locomotives that are actively "in use" at the time a claimant's injury is sustained. That does not mean, however, that state-law claims concerning locomotive design arising from injuries sustained when the locomotive is *not* in use are free to proceed. Those claims, too, are preempted, the government contends, because they conflict with the LIA's pur-

pose of making locomotive design exclusively subject to federal regulation. Yet failure-to-warn claims arising from off-line injuries—even claims asserting failure to warn of a defective design—are *not* conflict preempted on the government's view. These complicated distinctions are unprecedented, unnecessary, and unsupported by the statute's text and purpose.

1. The government's principal contention is that the LIA preempts the field of claims based on injuries arising when a locomotive is in use, but not when it is being repaired. U.S. Br. 11-18. The government asserts that the LIA regulates only locomotives and locomotive parts actively in use. U.S. Br. 11-13. And since the "preempted field is coextensive with the regulated field," field preemption "encompasses only claims based on injuries arising from operational locomotives." U.S. Br. 13.

The government is correct that the scope of field preemption is determined by the scope of the regulated field. But the pertinent regulated field here is defined by the regulatory authority delegated to DOT, which is *not* restricted to regulating only locomotives actively being used.

a. The government's argument that the "LIA regulates only the *use* on railroad lines of locomotives or tenders and their parts and appurtenances," U.S. Br. 11 (emphasis added), rests wholly on the first portion of the relevant LIA provision, which says that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances ... are in proper condition and safe to

operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1).

That provision sets forth the standard of care applicable to "railroad carrier[s]." But, as the government acknowledges, the field preemptive scope of the LIA is defined not by the duties it imposes on railroads, but by the authority it delegates to DOT. U.S. Br. 13. The provision cited by the government does not address DOT's regulatory authority. That authority is broader than the standard of care imposed on railroad carriers—it wholly encompasses "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611; *see, e.g*, 49 U.S.C. § 20701(2) (requiring DOT to prescribe standards for inspection); *id.* § 20702(a)(3) (requiring DOT to "ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances ... and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again").

In the context of DOT's regulatory authority, the "in use" requirement of the standard of care is irrelevant, because a locomotive's design and construction are the same whether the locomotive is in use or not. A state obviously could not enact a statute requiring locomotives to be constructed entirely from a particular type of material, and then circumvent the LIA by issuing citations for violations of the statute only against locomotives parked in repair stations. A state just as obviously could not enact a statute prohibiting the use of a particular material—such as asbestos—in locomotive construction, avoiding the LIA by simply enforcing the statute only against lo-

comotives being repaired off line. But that is precisely the effect of the United States' contention that LIA field preemption is categorically inapplicable to locomotives parked for repairs.

The government makes the same mistake in relying on cases concerning the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* That statute permits an injured railroad worker to recover compensatory damages from his employer (i.e., the railroad, not the locomotive equipment manufacturer) when the employer's "negligence played any part, even the slightest, in producing the injury." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957). And a worker can establish negligence per se under FELA by proving a violation of the LIA or other rail safety statute. *Urie v. Thompson*, 337 U.S. 163, 189 (1949). In FELA claims seeking to establish per se liability because of violations of the LIA, the courts of appeals have held that a railroad is per se liable only when the injury was sustained when the locomotive was "in use." U.S. Br. 12-13 (citing cases).

The "in use" requirement makes sense in the FELA context. FELA establishes a tort action against a railroad, and the scope of the railroad's per se liability is defined by the standard of care prescribed by the LIA. And, as explained, the standard of care established in the LIA applies only to the "use[]" and "operat[ion]" of the locomotive. 49 U.S.C. § 20701(1). But as also explained, preemption does not arise from the LIA's standard of care—it arises from delegation to DOT of exclusive regulatory authority over locomotive design and construction. And nothing in the LIA restricts DOT to regulating locomotive design and construction only while the

locomotive is actively being used. Federal regulations concerning those matters are not suspended at the roundhouse door.[1]

2. The government appears to recognize that it is senseless to preempt state regulation of locomotive design only when the locomotive is in use. To make its rule defensible, the government argues that while state-law claims involving repair-station injuries arising from the design of the locomotive are not *field* preempted, they are *conflict* preempted, because any claim based on locomotive design would frustrate the LIA's objectives. U.S. Br. 16-17 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Failure-to-warn claims, in contrast, apparently would be open to state regulation. U.S. Br. 17. The govern-

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[1] The government says that if claims based on injuries sustained in a repair station are preempted, then certain persons who suffer injuries there due to a locomotive's design or construction—i.e., contractors and third parties, or railroad employees who cannot prove simple negligence by their employers under FELA—would have no remedy for their injuries. U.S. Br. 13-15. But as the government recognizes, "[d]epriving injured individuals of a remedy may be justified when allowing a remedy would prevent the LIA from achieving its purposes," U.S. Br. 15, and the purpose of the LIA was to preclude states from regulating any aspect of locomotive design and construction. The government itself concedes that a contractor or third party outside the scope of FELA lacks a remedy against a manufacturer for design- and construction-related injuries occurring on line—the government does not explain why it makes "practical sense" (U.S. Br. 13) to treat those asserting injuries in the roundhouse differently. As for employee claims under FELA, the employer's negligence need only play the "slightest" part in the injury. *See supra* at 6. Given that easily-satisfied standard, there is no need to distort settled LIA preemption doctrine to provide railroad employees with claims against locomotive manufacturers.

ment's proposed conflict preemption rule is a field preemption rule by another name, and its distinction between design defect and failure-to-warn claims is untenable.

a. The government's proposed conflict preemption rule—which has never been adopted or even considered by any court—merely demonstrates the error of its primary position, *viz.*, that the field-preemptive scope of the LIA reaches only claims stemming from injuries sustained when the locomotive is in use. On the government's view, *every* claim based on locomotive design, construction, or material, while not field preempted, would still be conflict preempted because it would frustrate the objectives underlying the LIA. But that can be true only if the LIA's objective was to ensure that DOT—and not the states—was the exclusive source of legal standards governing locomotive design, construction, and material, irrespective of whether the locomotive happens to be "in use" at the time a legal standard is applied. In other words, the government's theory that a state law regulating locomotive design in repair shops conflicts with the LIA necessarily refutes its theory that the regulatory field occupied by the LIA is limited only to locomotives actively in use.

b. The government's proposed distinction between design defect claims (which it says are conflict preempted) and failure-to-warn claims (which are not) also does not survive scrutiny. The government contends that accepting a failure-to-warn claim "would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives." U.S. Br. 17. That distinction is misleading at best: while a failure-to-warn claim may

not itself literally mandate alteration of the design or construction of a locomotive, it comes to the same place, because the claim still (a) involves differing state-created standards for lawful locomotive design and manufacture, and (b) imposes liability under state law for violation of those standards.

It is clear that, if failure-to-warn claims were permissible, "states could promulgate otherwise pre-empted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999). Such claims thus directly contradict the LIA's objective of precluding states from imposing their own "differing requirements concerning locomotive design and construction." U.S. Br. 17. If states lack authority to decide that certain locomotive designs are unlawfully dangerous, they cannot have authority to decide that such designs are unlawfully dangerous if implemented without state-prescribed warnings.

Failure-to-warn claims also raise the same concerns about conflicting state standards that design defect claims raise. Because repairs to locomotives may need to take place at any time, locomotives would need to be equipped with warnings that are sufficient in every state through which they travel. But states may require different formulations of the same warning, and a warning that one state mandates might be viewed by another as unnecessarily cluttering a warning label and thus affirmatively reducing the effectiveness of its own required warnings. And even if it were possible to comply simultaneously with every state's warning requirements,

the state with the most stringent requirements would effectively be able to impose its law as a nationwide standard, which is exactly what Congress sought to avoid by enacting the LIA. *See, e.g.*, *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910-11 (9th Cir. 1997).[2]

B. The Government's Brief Suggests That *Atwell* Is Not The Most Suitable Vehicle For Addressing The Question Presented

The LIA applies only to "the locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701. But as the government observes, the trial court in *Atwell* found that the materials that allegedly caused the injury in that case were not locomotive parts and appurtenances, and thus were not subject to the preemptive effect of the LIA, whatever its scope. U.S. Br. 17. The government says that locomotive parts and appurtenances do not "include generic materials that require modification before they are suitable for use on locomotives," and the materials manufactured by John Crane, Inc. "appear to fall into that category of generic materials." *Id.* at 18.

The United States nonetheless urges the Court to grant John Crane's petition for certiorari: "Because the claims are outside the field based on the 'in use'

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[2] The government might mean to exclude from conflict preemption only failure-to-warn claims involving "materials used to repair locomotives" (U.S. Br. 17), but it is not clear why such claims would even implicate the LIA in the first place—unless those materials are "parts and appurtenances," in which case the LIA precludes states from imposing warning standards on their design and construction.

requirement [of the LIA], this Court need not address [whether John Crane's products are parts or appurtenances] if it grants review." *Id.* at 17. This Court, however, normally does not grant review when its decision would not likely affect the outcome of the case. E. Gressman et al., *Supreme Court Practice* 504 (9th ed. 2007). If the government and the *Atwell* trial court are correct, nothing this Court said about the scope of LIA preemption would affect the ultimate disposition of *Atwell*, because the LIA would not apply at all to the claims in that case.

That problem does not exist in the instant case. Viad Corp is the alleged successor-in-interest to a company that manufactured the entire locomotive, not just components that may or may not qualify as parts or appurtenances under the LIA. The proper scope of LIA preemption is thus unavoidably presented in this case.

What is more, the government's error in asserting that failure-to-warn cases are not preempted may be a product of the particular facts of *Atwell*, which appears to concern products that "required cutting and other manipulation before they could be installed on locomotives." U.S. Br. 18. The government suggests that imposing warning requirements on such products does not threaten the ability of locomotives to move freely across state lines. That position is dubious on its own terms, but it becomes fantastical when applied in the context of a case like this one involving an entire locomotive. The government does not explain how a manufacturer could attach labels to the locomotive sufficient to satisfy the varying laws—typically, unwritten tort laws—of every state the locomotive might travel through. Indeed,

that is why the LIA reaches only locomotives and their parts and appurtenances, which *by necessity* travel across state borders. If this Court is inclined to address the government's new preemption theories, it should do so in a case that involves an entire locomotive, and thus presents those theories in the sharpest relief.

CONCLUSION

Certiorari should be granted, and the judgment below should be affirmed.

Respectfully submitted,

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN
& GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(Counsel of Record)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Massachusetts only*

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